IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-1651

NEW JERSEY DENTAL ASSOCIATION, a Not-for-Profit Corporation of the State of New Jersey, MERCER DENTAL SOCIETY, a Not-for-Profit Corporation of the State of New Jersey, SOUTHERN DENTAL SOCIETY OF THE STATE OF NEW JERSEY, a Not-for-Profit Corporation of the State of New Jersey, NEW JERSEY DENTAL SERVICE PLAN, INC., a Not-for-Profit Corporation of the State of New Jersey, DR. PAUL G. ZACKON, an Individual, DR. DONALD DeFONCE, an Individual, DR. EUGENE BASS, an Individual, DR. LEWIS KAY, an Individual, DR. STANTON DEITCH, an Individual, DR. ROBERT FISCHER, an Individual, and DR. JOSEPH POLLACK, an Individual,

Petitioners,

v.

STANLEY S. BROTMAN, United States District Judge for the District of New Jersey,

Respondent.

PETITIONERS' REPLY TO BRIEF OF RESPONDENTS HEALTH CORPORATION OF AMERICA, ET AL. IN OPPOSITION TO MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS AND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

ARTHUR MEISEL,
HERBERT F. MOORE,
JAMIESON, McCARDELL, MOORE,
PESKIN & SPICER,
A Professional Corporation,
19 Chancery Lane,
Trenton, N. J. 08618
(609) 396-5511
Attorneys for Petitioners.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

INDEX.

TABLE OF CITATIONS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No.

NEW JERSEY DENTAL ASSOCIATION, a Not-for-Profit Corporation of the State of New Jersey, MERCER DENTAL SOCIETY, a Not-for-Profit Corporation of the State of New Jersey, SOUTHERN DENTAL SOCIETY OF THE STATE OF NEW JERSEY, a Not-for-Profit Corporation of the State of New Jersey, NEW JERSEY DENTAL SERVICE PLAN, INC., a Not-for-Profit Corporation of the State of New Jersey, DR. PAUL G. ZACKON, an Individual, DR. DONALD DeFONCE, an Individual, DR. EUGENE BASS, an Individual, DR. LEWIS KAY, an Individual, DR. STANTON DEITCH, an Individual, DR. ROBERT FISCHER, an Individual, and DR. JOSEPH POLLACK, an Individual,

Petitioners,

v.

STANLEY S. BROTMAN, United States District Judge for the District of New Jersey,

Respondent.

PETITIONERS' REPLY TO BRIEF OF RESPONDENTS HEALTH CORPORATION OF AMERICA, ET AL. IN OPPOSITION TO MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS AND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioners respectfully submit the within brief pursuant to Rule 24 of the Revised Rules of the Supreme Court of the United States in reply to the brief of respondents Health Corporation of America, *et al.*

ARGUMENT.

Petitioners Seek Review Alternatively by Certiorari or Mandamus.

In their opposing brief, respondents Health Corporation of America, *et al.*, argue that petitioners are not requesting a petition for writ of certiorari, but seek only a petition for writ of mandamus. This argument is wholly without merit. Petitioners unequivocally state:

> "This matter is brought to review an order of the United States Circuit Court of Appeals for the Third Circuit rendered on February 24, 1977 and entered on the same date. The jurisdiction of the Supreme Court of the United States to review this suit (a) by certiorari is conferred by Title 28, *United States Code*, Section 1254(1), and alternatively, (b) by Writ of Mandamus pursuant to Title 28, *United States Code*, Section 1651."
>
> (Petitioners' Petition, p. 5)

Supporting authority for the procedural relief requested is found in *Schlagenhauf v. Holder*, 379 U. S. 104 (1964) cited by all counsel, where this Court granted certiorari to review the denial by the Court of Appeals of the Seventh Circuit of a petition for writ of mandamus.[1] Citing language set forth in *Bankers Life & Casualty Co. v. Holland*, 346 U. S. 379, 383 (1953), the Court concisely stated:

> "The writ [of mandamus] is appropriately issued . . .

1. See also *Thermtron Products, Inc. v. Hermansdorfer*, 423 U. S. 336 (1976) where a petition for a writ of certiorari was granted to review the denial of an alternative petition for a writ of mandamus or prohibition filed in the Court of Appeals for the Sixth Circuit, and *Kerr v. United States District Court*, 426 U. S. 394 (1976) where certiorari was granted to review the denial of a petition for mandamus, by order and without opinion, by the Court of Appeals for the Ninth Circuit.

> when there is 'usurpation of judicial power' or a clear abuse of discretion."
>
> *Schlagenhauf v. Holder*, 379 U. S., *supra*, at 110.

Petitioners respectfully contend that the refusal by a District Judge to decide a fundamental motion on the ground presented by the moving party effectively constitutes a usurpation of judicial power. Litigants are entitled as a matter of judicial propriety to receive a ruling upon the motion actually made rather than upon one which might have been—but was not—asserted.[2] That is especially true here where a favorable decision on the motion would put an end to expensive, complex and time consuming litigation.

In addition, the refusal by the trial judge to incorporate in his order the language required by 28 U. S. C. § 1292(b) so that leave could be sought to file an interlocutory appeal independently constitutes a clear abuse of discretion because it produces a result which Congress intended to avoid. The power of an appellate court to remedy such abuse by granting a writ of mandamus represents an important undecided question concerning the construction of 28 *U. S. C.* § 1292(b),[3] which should be reviewed by this Court.

2. In the case at bar, petitioners could have argued that respondents Health Corporation of America et al. came into Court with unclean hands. They *did not* raise that defense. Rather, they contended that said respondents had neither been injured in their business or property within the meaning of 15 U. S. C. § 15 nor suffered injury or damage under 15 U. S. C. § 26 because they were forbidden by an "affirmative command" of the State of New Jersey from engaging in the affected business, *Bates & O'Steen v. State Bar of Arizona*, — U. S. —, 45 LW 4895, 4898 (1977); *N. J. S. A.* 17:48C-34, *N. J. S. A.* 45:6-13.

3. In this connection, see *Gillespie v. U. S. Steel Corp.*, 379 U. S. 148, 154 (1964) where the Court of Appeals for the Sixth Circuit avoided the problem by treating the judgment rendered therein as final rather than interlocutory. Upholding the action of the Court of Appeals, this Court said:

> "it is true that if the District Judge had certified the case to the Court of Appeals under 28 U. S. C. § 1292(b) (1958

CONCLUSION.

Based upon the aforesaid argument and the arguments set forth in the petition for writ of mandamus and petition for writ of certiorari to the United States Court of Appeals for the Third Circuit filed with this Court on May 25, 1977, petitioners respectfully request the issuance of a writ of certiorari to review the decision in this matter by the Court of Appeals for the Third Circuit or, in the alternative and in order of preference, the issuance of a writ of mandamus directing respondent to (a) issue an order dismissing the private antitrust action brought against petitioners by Health Corporation of America, *et al.*, on the ground that they are without standing under Sections 4 and 16 of the Clayton Act, 15 *U. S. C.* § 15 and 26; (b) reconsider the motion to dismiss the aforesaid private antitrust action on the issue of standing alone, and not on the issue of unclean hands; or (c) incorporate in his order the language required by 28 *U. S. C.* § 1292(b) so that petitioners can seek leave to file an interlocutory appeal with the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

ARTHUR MEISEL,
HERBERT F. MOORE,
JAMIESON, MCCARDELL, MOORE, PESKIN AND SPICER,
A Professional Corporation,
Attorneys for Petitioners.

---

3. (Cont'd.)
ed.) [which he did not do], the appeal unquestionably would have been proper; in light of the circumstances, we believe that the Court of Appeals properly implemented the same policy Congress sought to promote in § 1292(b) by treating this obviously marginal case as final and appealable under 28 *U. S. C.* § 1291 (1958 ed.)"